IN THE HIGH COURT OF KERALA AT ERNAKULAM

PRESENT :

THE HONOURABLE MR. JUSTICE K.PADMANABHAN NAIR

THURSDAY, THE 29TH NOVEMBER 2007 / 8TH AGRAHAYANA 1929

RFA.No. 228 of 2003(E)

OS.60/1982 of ADDL.SUB COURT,KOTTAYAM
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APPELLANT IN AS/ADDL.PLAINTIFF NO.2 IN SUIT.

NARAYANAN, SON OF RAMAN, RESIDING AT KOZHIPLACKAL MALAYIL, KOOTHATTUKULAM KARA, KOOTHATTUKULAM VILLAGE, MUVATTUPUZHA TALUK FROM ARACKAL HOUSE, MIDAIKUNNU KARA, THALAYAZHAM VILLAGE, VAIKOM TALUK.

BY ADV. SRI.S.V.BALAKRISHNA IYER (SR.)
SRI.A.M.PRATAP SINGH

RESPONDENTS/DEFENDANTS 1 TO 9 AND 11 TO 18 IN SUIT
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1. KRISHNAN RAGHAVAN, RESIDING AT ARACKAL, MIDAIKUNNU KARA, THALAYOLAPPARAMBU VILLAGE, KOTTAYAM DISTRICT. (DIED)

2. CHELLAPPAN, RESIDING AT KARATHANATTIL VEETTIL, IN DO. DO.

3. RAJAPPAN, IN DO. DO.

4. SOMAN, RESIDING IN DO. DO.

5. KUTTAN, THANNIPPALLIL VEETTIL, VELLOOR KARA, VELLOOR VILLAGE FROM KOTTARATHIL VEETTIL, MIDAIKUNNU KARA, VADAYAR VILLAGE, VAIKOM TALUK.(DIED)

6. PRABHAKARAN, RESIDING AT KOTTARATHIL MIDAIKUNNU KARA, THALAYOLAPARAMBU VILLAGE, VAIKOM TALUK.

7. DAMODARAN, RESIDING AT THANNIPPALLIL VELLOOR KARA, VELLOOR VILLAGE, FROM KOTTARATHIL, MIDAIKUNNU KARA, THALAYOLAPARAMBU VILLAGE, VAIKOM TALUK.

8. BHAVANI,RESIDING AT MANIYAKKUNNUKANATTU VEETTIL, MEENANGADI, KOLASSERY DESOM, KOZHIKODE DISTRICT FROM ARACKAL HOUSE, MIDAIKUNNU KARA VADAYAR VILLAGE, VAIKOM TALUK.(DELETED)

9. KALI MADHAVI, RESIDING AT MALAYIL ESTATE, KADALMADU DESOM, SOUTH WYNAD TALUK.(DIED)

10. PANKAJAKSHY, KARAKKANATTIL, MIDAIKUNNU KARA, THALAYOLAPPARAMBU VILLAGE VAIKOM TALUK.

11. LAKSHMI, RESIDING IN DO. DO.

12. SIVANI, RESIDING IN DO. DO.

13. HAIMAVATHY, RESIDING IN DO. DO. DO.

14. CHANDRAMATHY, RESIDING IN DO. DO.

15. RADHAMONY OF DO. ON DO.

16. MADHAVI OF DO. IN DO. DO. (DIED)

17. THANKAMMA, VAISHEL VEETTIL, MEVALLOOR KARA, VELLOOR VILLAGE, VAIKOM TALUK. (DIED)

(THE NAME OF R8 IS DELETED FROM THE PARTY ARRAY AT THE RISK OF THE APPELLANT, VIDE ORDER DT. 22/7/03 IN I.A. 873/03)
(THE APPELLANT IS EXEMPTED FROM IMPLEADING THE LEGAL REPRESENTATIVES OF THE DECEASED R1, 5, 9, 16 AND 17 VIDE ORDER DT. 18.6.04 ON I.A. 1775/04)

BY

THIS REGULAR FIRST APPEAL HAVING BEEN FINALLY HEARD ON 29/11/2007, THE COURT ON THE SAME DAY PASSED THE FOLLOWING:

K.PADMANABHAN NAIR, J

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R.F.A. No. 228 of 2003

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Dated this the 29th day of November, 2007

JUDGMENT

The additional plaintiff in O.S.60/1982 on the file of Subordinate Judge's Court Kottayam is the appellant. The appeal is filed against the decree and judgment passed by the trial court dismissing the suit for partition. The deceased 1st plaintiff filed the suit for partition on the following averments. Deceased 1st plaintiff, Krishnan and Kelan were the children of deceased Chakki. Defendants 1 to 4 are the children of Krishnan. Defendants 5 and 7 are the children of Kelan. Defendants 8 to 10 are the children of plaintiff. First plaintiff, Krishnan and Kelan were members of a Hindu Ezhava Undivided Marumakkathayam tharavad. The suit properties belonged to the tharavad and purchased and tharavad funds and it was in the joint possession of the plaintiff and her brothers, mainly by Krishnan, who was the Karanavan of tharavad. Krishnan who was Karanavan of tharavad created some items of property without any

consideration or tharavad necessity and those documents are void. Some of the items of the suit properties were sold to strangers. Those strangers were not impleaded in the suit and the properties so sold are to be set apart to the share of defendants 1 to 7. Deceased 1st plaintiff was residing in a building situated in Veliparambu, Purayidom in Velloor village and she was forcibly evicted from the building. Hence the plaintiff claims her 1/6th share.

2. Defendants 2 and 4 alone filed written statement. It was contended that the suit was not maintainable and plaint items are not partible. It was contended that the plaintiff and defendants 1 and 5 to 10 have no right over the suit properties. It was also contended that the legal representatives of Krishnan and Kelan are not impleaded in the suit. Krishnan has 2 wives. The second wife is still alive. Apart from defendants 1 to 3, Krishnan had 6 other children by name Pankaljakshi, Lakshmi, Sivani, Hymavathi, Chandramathi and Radhamani. Kelan had another daughter by name Thankamma. Since these persons were not impleaded, the suit was bad for non-joinder of necessary parties. There was no tharavad as alleged in the plaint. The suit items were not tharavad properties. An area of

29 cents in item no.13 and 30 cents in item no.16 alone are properties owned by the father of the plaintiff, Krishnan and Kelan. The remaining items are absolute properties of Krishnan. Kali, along with her children and Krishnan sold the 2 items of properties to Madhavi in the year 1950, the 1st wife of Krishnan and the vendees are in possession of the properties. Defendants 5 to 7 who were residing in item no.16 transferred their right over the property also to Madhavi about 25 years ago. After sale deeds Madhavi was in possession and enjoyment of properties. She sold her properties with rights in the year 1962. The plaintiff or her children and Kelan and his children have no right or possession over these items. Krishnan died in the year 1961. There was a settlement deed in the year 1962 by which the properties were settled in favour of children of Krishnan. Items 1 to 3 were allotted to second defendant. Second defendant sold item no.1 to Eswaran Namboodiri in the year 1971. He also obtained certificate of purchase in respect of item no.2. Item no.3 that was acquired for Velloor newsprint Factory and he alone is entitled to compensation. Items 8 to 10 were allotted to the 4th defendant. 4th defendant obtained certificate of purchase in respect of item no.10. The remaining items were allotted to

Rajappan, Sivani, Chandran, and Radhakrishnan as such. Of these persons Himavathy, Sivani and Chandramathi sold their rights to strangers. Krishnan allotted some of his property to Pankajakshi and Lakshmi who were the children born to him in his 1st wife and those properties are not scheduled in the plaint. From the dates of two settlement deeds, the parties are in absolute possession and enjoyment of properties openly and without any denial of right of another person. So even if the plaintiff or any other person had the right the same was lost by adverse possession and limitation. The averment that Krishnan was not the Karanavan of tharavad was denied. Items 13 and 16 alone were in the joint possession. It was also contended that Krishnan was conducting the business of sale of coconut, timber etc. and utilising the income derived from the business he purchased the properties. No money belong to tharavad or any other person was utilised for the purchase of those items. The plaintiff is residing with her family in Kuthattukulam. The plaintiff had no ailment and the documents executed by Krishnan are valid and they are not liable to be set aside. It was also contended that plaintiff has not given the details of documents which are to be set aside. Hence they pressed for dismissal of

the suit.

Trial court found that the suit is bad for non-joinder of necessary parties. Even if the plaintiff had any right, the same was lost by adverse possession and limitation Trial court also accepted the contention of the contesting defendant, that apart from item 13 and 16 other properties are separate properties of Krishnan. It was further found that items 13 and 16 were joint properties but it was alienated years back. Regarding item no.4, there is absolutely nothing in record to show that it belongs to tharavad. During the pendency of the suit the 1st plaintiff died. 10th defendant was transposed as additional plaintiff. Trial court dismissed the suit. Challenging the judgment and decree passed by the trial court, the additional plaintiff has filed this appeal.

The learned counsel appearing for the appellant has argued before me that the findings of the court below that suit items are not at all properties of tharavad and not liable for partition are illegal. It is argued that Ext.A3 sale deed, shows that the properties described in Ext.A3 are properties of the tharavad. It is argued that material on records shows that Krishnan was the karanavan and using this income he obtained the tharavad properties. The other properties are purchased by blending of

properties with tharavad properties and that properties are liable to be partitioned. It is argued that the non-impleadment of the necessary parties is vital to the suit. In the plaint itself it is admitted that the properties due to those persons can be set apart to the share of contesting defendants.

2. I shall first deal with the correctness in the findings of court below that the suit is bad for non-joinder of necessary parties. The suit was filed in year 1982, i.e., to say after the commencement of Joint Family System Abolition Act. Going by the case of the appellant that the suit is for partition of property belong to tharavad, it is trite law that in view of the provisions in the Joint Family System Abolition Act a notional partition took place on 1.12.1976 and all persons who were alive on that day were entitled to get share in the tharavad properties. PW1 had admitted that the Santha referred to daughter of Bhavani and she alive on the date of suit. He contended that Bhavani has 3 daughters and she has got 3 sons. It is also admitted that Madhavi has got 3 daughters and 4 sons and none of them were impleaded in the suit. There is an admission in the plaint itself, that some of the defendants had alienated the property in their possession and those properties are not ancestral. So

the material on record shows that some of the sharers also alienees from sharers were not made parties to the suit for partition. Shares due to the parties cannot be quantified in this proceedings. So the finding of the court below that the suit was bad for non-joinder of necessary parties is correct.

3. Issue no.3 raised by the trial court is regarding adverse possession and limitation. The trial court found that plaintiff or any of the contesting defendants had raised any contention that from the date of Ext.B1 and B2 Madhavi and children were in absolute possession and enjoyment of plaint schedule properties even if the predecessors had any right. The same was stated in Ext.B1 dated 6.2.1950 and B2 dated 6.2.1960 in the paragraph 14 of the ... which deals with cause of actions. It is specifically averred that the plaintiff made a claim for partition during December 1966 and that demand was rejected by the defendants. So the admission made by the appellant would show that the deceased 1st plaintiff made a demand for partition in the year 1966 and that was rejected by contesting defendants but the plaint was presented only on 17.3.1980. Further in B2 settlement deed dated 6.2.1962 the demand made by the plaintiff-PW1 shows that the properties

covered by Ext.B1 sale deed are in the possession of Madhavi and her children. He had also admitted that from the date of B2, they are in the possession and enjoyment of properties covered by the document. The appellant gave evidence to the fact that till 1975 she was residing in the purayidam described in the plaint schedule. Admission in the plaint clearly shows that the suit was brought after 12 years. Suit is for declaration and partition. Third prayer in the suit is to set aside all the documents executed by the defendants and their predecessors in Ext.B1 first in the year 1950 and B5 as dated 18.1.1952, B2 settlement deed dated 6.12.1962. PW1 during his evidence stated that he was aware of all those documents at least from the year 1975. Suit was filed after 3 years from the date of such information. Under Article 58 of the Evidence Act, the suit for declaration is to be filed on the 3 years from the date prescribed. Even if the document is a void one, the suit is to be filed within 12 years from the date. The plaintiffs have no case, that they have approached the court within 12 years. On the ground of limitation also the plaintiff is not entitled to any relief.

4. Now I shall consider the case on its merits also. Evidence on record shows that item 13 and 16 were in the joint

possession. Ext.A3 is a copy of sale deed executed by deceased-1st plaintiff in favour of Kelan that was dated 31.11.1982. There is an admission in that document to the effect that the properties in that document were tharavad properties. The trial court had found that the admission will not bind Krishnan or his children even assuming that the properties were sold to Madhavi under Ext.A4 dated 14.2.1950. Ext.B2 is another sale deed executed by Krishnan, Kali and children of Kali additional plaintiff and minors regarding the items mentioned in the plaint except item 14. There is an observation in Ext.B1 to the effect that items 13 and 16 were sold for family necessities. Regarding items excluding items 4, 13 and 16, the evidence on record shows that some of those items were acquired by Krishnan. The learned counsel appearing for the appellant relied on the principles laid down in **Narayanan Nair v.Parukutty Amma** (1960 KLT 1366), **Mellesappa Bandeppa Desai and another v. Desai Mallappa alias Mallesappa and another** (AIR 1961 SC 1268), **Achuthan Nair v. Chinnammu Amma and others** (AIR 1966 SC 411) in support of his case. It is also argued that when there is plaintiff of .. tharavad members. property will ... towards character and violation become of will also payment the character

of tharavad properties. There cannot be any dispute regarding the legal rights in those decisions. But in this case the question is whether there was sufficient income for purchase of the other items. PW1 pleaded complete ignorance on these aspects. He deposed that he does not know whether the family have any property at all. PW1 gave evidence to the effect that Krishnan have no business in the sale of coconut and timber and with those funds he acquired remaining items. So in this case there is no evidence available to show that tharavad had properties and the income derived from that properties is sufficient to purchase the other items. So finding of the court below that the plaint items were not available for partition is also correct and does not call for interference. In the result, the appeal is dismissed.

K.PADMANABHAN NAIR,
JUDGE

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